IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY & INTESTATE JURISDICTION.

MISCELLANEOUS PETITIONNO. 33 OF 2004

IN

PROBATE PETITION NO. 143 OF 2004

1. Vispy Bahadur Kapadia]
of Mumbai, Parsi,]
Indian Inhabitant]
residing at 12/8,Rustom]
Baug, Byculla,Mumbai]

2. Mrs.Shazneen Jahangir]
Dhatigara, Parsi,]
residing at 7, Seth]
Naval Tata Bldg, 2nd]
Floor, 38th Road,]
Tata Blocks, Bandra(W)]
Mumbai 400 050.]... Petitioners.

Versus.

1. Kisan Yashwant Dhomase]
of Mumbai, Rm.No.3,]
Ram Varma Chawl, S.K.]
Kapadia Estate, village]
Kirol, Ghatkopar,]
Mumbai 400 086.]

2. Mr. Magan Amin Attar,]
Muslim, Mumbai inhabit-]
ant, having his office]
at 21, Kalyanji Devji]
Compound, Dharmveer]
Sambhaji Lane, Chirag]
Nagar, Ghatkopar(W)]
Mumbai 400 086.]... Respondents.

Ms. Nilima Datta for the Petitioners.
Mr. A.J. Almedia for the Respondents.

CORAM : S.K.Shah, J.

Date of Reserving the Judgment : 23.9.2004
Date of Pronouncement of Judgment : 30.9.2004

-:ORAL JUDGMENT :-

1. By this Petition, the Petitioners seek revocation of the Probate granted in favour of the Respondent NO.2 on 30th June, 2004.

2. One Nariman Shavaksha Tapadia, who was aged about 85 years, died at Bombay on 24th July, 2003, leaving behind a Will, dated 4th March, 2003. The Respondent NO.2 claimed to be the Administrator under the Will and the Respondent NO.1 was the beneficiary. The Respondent No. 2 in a capacity as Administrator, filed the aforesaid Testamentary Petition No. 143 of 2004 for grant of probate in his favour. In the Petition, in paragraph No. 9, he had specifically mentioned that the deceased left him no surviving heirs and next of kin according to the Indian Succession Act, 1925, as applicable to the Parsis. In view of that statement, the citation was published and as there was no challenge to the petition, the probate came to be granted on 30.6.2004.

3. The Petitioners are the close relations of the deceased, the petitioner No.1 is the nephew and the petitioner No.2 is the grand-daughter of the deceased.

They alleged that the deceased was an old man and had a great deal of forgetfulness, irritatibility and tendency to wonder away from the house. The Respondent NO.1 was engaged as a rent collector on behalf of the deceased. The Respondent No.2 is an advocate. It is alleged that the Will is not executed by the deceased and there are number of surrounding suspicious circumstances. They further alleged that in February, 2004, the Petitioner No. 1 got an information that the Respondent NO.1 was collecting and pocketing the rent money, due to Kapadia family, on the basis of an authority in writing from the deceased. Therefore, the Petitioner No.1 contacted respondent NO.1 and demanded explanation. Sometime in April, 2004, the Respondent No.2 visited the Petitioner No.1 at his residence and showed a document purported to be the last Will and testament of the deceased. They have seen the said copy of the Will. The petitioners were satisfied that it was not a genuine document and it was a fake one. It is alleged that the respondents did not inform the petitioners that they had already applied for grant of probate. The Petitioners contacted the family friends, who were close to the deceased. There was correspondence with the respondent No. 2 demanding inspection of the purported original Will and other documents, purported to have been executed by the deceased and also the Court documents; but the petitioners did not receive any response. On 22nd June,

2004, the Petitioner received a letter sent by officer of BMC, 'N' Ward, Ghatkopar (E), issued in the name of the deceased, demanding payment of outstanding dues. On 24th July, 2004, the Petitioner received a letter, dated 19.7.2004 in Marathi from City Survey Office at Mulund, communicating that the Respondents had approached that office and showed a Probate Certificate granted by the High Court and demanded that the property of the deceased at Parsiwadi be transferred in the name of the Respondent NO.1. It is, thereafter, that the Petitioners filed the aforesaid petition.

. Their main contention is that the citation of the Testamentary Petition No. 143 of 2004 was not served on them. They were not made parties to the said petition although the Respondent NO.2 had knowledge that they (petitioners) were the heirs of the deceased and they have interest in the property of the deceased. As such, the Petitioners claim revocation of the probate granted in favour of the Respondent No.2.

4. Respondent No.2 by affidavit-in-reply opposes this petition, mainly on the ground that the petitioner NO.1 had knowledge of the testamentary petitione No. 143 of 2004 and even then he did not come forward to challenge the petition. The Respondents explained as to how the Respondent No.1 was collecting rent on behalf of

the deceased and respondent NO.2 advocate, came in contact with the deceased and that the deceased made a Will bequeathing the property for the benefit of Respondent No. 1, appointing respondent NO.2 as administrator.

5. It is contended by the Respondent NO.2 that he had made the publication of the citation in Free-Press Journal on 27th March, 2004 and in 'Jame Jamshed' on 4th April, 2004 as the deceased was Parsi. Thereafter, one Manek Engineer, representative of the Petitioners met the Respondent No.2 on 5th April, 2004 with paper cutting of Jame Jamshed and informed that there were legal heirs to the said deceased and one of them is the Petitioner No.1. The said Mr. Engineer also gave address and telephone number of the Petitioner No.1. Thereupon, he contacted the Petitioner No.1 on phone and offered to give all the information he wanted. Thereafter, respondent No.2 met the petitioner NO.1 at his residence on 12.4.2004 to discuss the matter. At that time, he contend, he handed over the Xerox copy of the Will to the Petitioners alongwith the copy of the probate petition. Thereupon the Petitioner No.1 suggested that he himself and the Respondent No. 2 should proceed to obtain Probate jointly and Mr.Manek Engineer would handle the matter. He further contended that on 15th April, 2004, he received a letter from

Advocate Mr. Salunke on behalf of the Petitioners, calling upon him to give the papers of Probate Petition, however, the Respondent No.2 contacted Mr. Salunke on telephone and informed him that he had already given the copy of the Will and all the papers to the Petitioner No.1. Advocate Mr. Salunke, thereupon told him that he need not reply the letter. He further contend that thereafter he did contact the petitioner and Mr. Manek till June, 2004, but they did not co-operate or opposed the grant of probate by filing the proper proceedings. Thereafter on 20th July, 2004, he received a letter from advocate Ms. N. Datta on behalf of the Petitioners calling upon him to give papers of the probate petition. On that letter, he made an endorsement about the papers having already been given to the petitioner on 11.4.2004, as aforesaid. The reply also mentions as to the subsequent meetings with the petitioners, with which we are not concerned, as the probate was already granted on 30th June, 2004.

6. Thus, in short, the contention of the Respondents is that the Petitioner No.1 was having knowledge of that probate petition and even then he did not oppose the proceedings by appearing in that petition.

7. By way of rejoinder, the petitioner No.1 has denied the contentions of the Respondent No. 2 about

giving copy of the probate petition on 11.4.2004 or subsequent thereto.

8. I have heard the learned Counsel on both sides.

9. I am restricting myself to the rival contentions with regard to the proper service of the citation to be made on the Petitioners, as in my view, this could be the only aspect, which could have material bearing on the decision of this petition.

. In this regard, the contention raised on behalf of the Petitioners is that they were neither made party to the testamentary petition No. 143/2004 nor they were served with the citation and, therefore, they could not file Caveat in the petition.

. As against this, the contention raised on behalf of the Respondents is that although the petitioners were not made party, they were having knowledge of the probate petition having been filed in this Court and, even then, they did not voluntarily come forward before the Court to oppose the grant of the probate.

10. It is undisputed fact that the petitioner No.1 is the Nephew of the deceased. The Pedigree of the family is given at Exhibit 'A'. It shows that the Petitioner No.1 is the son of Bahadur, who happened to be the brother of the deceased. Bahadur is not alive. The Petitioner No.2 is the daughter of Shahrukh, who died in 1996, who was the son of the deceased i.e. the Petitioner No.2 is the grand daughter of the deceased, which relation has not been disputed. It is further undisputed that both these petitioners were not cited as relations, being related to the deceased in the Testamentary Petition No. 143 of 2004. Obviously, therefore, no independent citation was issued or served on them.

. On the contrary, in the Petition No. 143/2004, it has been specifically mentioned in paragraph No. 9 that " the deceased left him no surviving heirs and next of kin according to the Indian Succession Act, 1925 as applicable to the Parsis".

11. The allegation is that the citation was served in Free Press Journal as well as Jame Jamshed. The Publication was made in Jame Jamshed as the deceased was a Parsi. It is contended by the Respondent that one Mr. Manek Engineer met respondent No.2 on 8.4.2004, claiming himself to be the representative of the petitioner No.1

with a paper cutting of Jame Jamshed and informed him that there were legal heirs of the deceased and one of them is the Petitioner No.1. It is contended that Mr. Engineer also gave to the Respondent No. 1, address and telephone number of the Petitioner No.1. It is, thereafter that the Respondent NO.2 contacted the Petitioner No.1, who, in turn, called upon the Respondent No.2 to furnish certain information, which the Petitioner No.1 wanted. Accordingly, they met on 11.4.2004 at the house of the Petitioner No.1. It is further contended that it is Mr. Engineer, who took both the Respondents to the house of the Petitioner No.1. It is further contended that at that time, the respondent No.2 handed over the Xerox copy of the Will of the deceased alongwith the copy of the probate petition to the Petitioner No.1. Thereupon, it is contended, that the Petitioner No.1 expressed that they would proceed to obtain the probate jointly and that Mr. Engineer would handle the case. It is further contended that thereafter on 15th April, 2004, the Respondent NO.2 received a letter from Advocate Salunke, the advocate of the Petitioner No.1, calling upon him to give the papers of the probate petition. However, respondent NO.2 contends that he had already handed over the copy of the Will and the papers of the probate petition on 11.4.2004, he contacted advocate Salunke on telephone and informed him accordingly and, thereupon, Mr.

Salunke told him that in that case, he need not reply the letter. On the basis of these contentions, it is vehemently submitted by the learned Counsel representing the Respondents that the Petitioner No.1 was knowing about the probate petition having been filed in this Court and even then, till the probate was granted in favour of the Respondent No.2, they did not come forward and filed Caveat. Therefore, his submission is that now

they cannot challenge the grant of probate as they had sufficient knowledge of the probate petition having been filed in this Court.

. As against this, it is submitted on behalf of the Petitioners that the fact of handing over of the probate papers on 11.4.2004 has been denied by the Petitioner No.1 in rejoinder that in the meeting on 11.4.2004, only the copy of the Will was handed over and nothing more and, it is, therefore, by letter dated 15.4.2004, issued through Advocate Salunke, they made a demand of the Probate Petition's papers, which they did not receive and, therefore, they could not file any Caveat in the Probate Petition.

12. In view of these contentions, it is doubtful whether on 11.4.2004 the Respondent No.2 had a meeting with Petitioner No.1 and informed about the probate

petition having been filed in Court. If that was so, the Petitioner's advocate Mr. Salunke would not have addressed a letter immediately on 15.4.2004 making a demand of the probate petition papers. The talk which according to the Respondent No.2 , he had with Advocate Mr. Salunke has also been denied in the rejoinder. In fact, the Respondent NO.2 could have sent the reply to the letter received by him from Advocate Mr. Salunke, which he did not do so. It is further pertinent to note that during the exchange of letters and notices, lastly by Ms. N. Datta, advocate of the Petitioner No.1, addressed a letter dated 28.7.2004 to the Respondent No.2 calling upon the Respondent NO.2 to give inspection and provide copy of the probate petition and all the papers filed by the Respondent No.2 in the High Court in the proceeding, immediately on receipt of the letter. The respondent NO.2 in his own hand made endorsement on it and the endorsement is worth noting. It is as under :-

> "The documents i.e. Will executed by N.S. Kapadia is given to Vispy Kapadia, petitioner No.1, on 11.4.2004 at his residence, when joint meeting with the family members, well wishers was held. Please note."

. If on 11.4.2004, the Respondent No.2 had delivered the copies of the probate petition, that obviously would have been made reference to in this endorsement. This is so because, by this letter,

(Exhibit 'F' to the Petition) a demand of copy of the probate petition and all papers filed by the Respondent NO.2 in the High Court was made. Absence of the mention of the copies of the probate petition having been given on 11.4.2004 would clearly indicate that the copies of the probate petition were not given to the petitioner NO.1 on 11.4.2004.

. These circumstances therefore, clearly indicate that the Petitioner NO.1 did not have any material as to the probate petition having been filed in the Court and he came to know about it only subsequently, when the probate was granted on 30.6.2004.

. As regards the petitioner No.2, who happened to be the grand daughter of the deceased, she obviously did not have any knowledge about the pobate petition. On Respondent No.2's own showing that he was informed by Mr. Enginner that there were heirs of the deceased and one of them was Petitioner No.1 and it is therefore, he happened to meet petitioner No.1 on 11.4.2004. If this was so, it was necessary for the Respondent NO.2 to show the Petitioner No.1 and other heirs, as he contend to have been disclosed to him by Mr. Enginner, as parties to the Testamentary Petition No. 143 of 2004 and should have served citation on them, individually after getting their addresses. As regards the Petitioner No.1,

according to the own contention of Respondent NO.2, Mr. Engineer had given him address as well as telephone number of the Petitioner No.1. Therefore, there was no difficulty for the Respondent No.2 to make the Petitioner No.1 as party to the Probate Petition. Under these circumstances, it is clear that the Respondent No.2 had not served the citation of Testamentary Petition No. 143 on any of the Petitioners. There is also nothing on record to indicate that the Petitioner No.2 had knowledge of the probate petition.

13. Moreover, when by letter dated 15.4.2004, the demand for probate petition was made the papers of probate petition were not made available, which prevented the petitioners to appear in the petition. In any event, it was the duty and responsibility of the Respondent NO.2 to show and give them the probate petition papers and also to show them as party to the probate petition No. 143 of 2004 as heirs of the deceased and should have served the citation on them. Issuance of public citation would not be sufficient.

14. In this regard a submission made on behalf of the Respondent No.2 is that mere non-service of the citation is not sufficient ground for revocation of the probate. For this proposition, he cited ruling of the Madras High

Court in case of **G. Shanmugham Chetti and anr. Vs. Chinnammal reported in 1978 Madras 265.** and the decision of Supreme Court in case of **Anil Behari Ghosh Vs. Smt. Latika Bala Dassi reported in (S) AIR 1955 SC 266**.

. The facts in these two cases before the respective Courts were different than the facts in the instant case before me. In the Madras case (Supra), the petition for revocation was filed after twelve years and in the case before the Apex Court, the revocation petition was filed after lapse of 27 years and, therefore, the view that was expressed was that the omission to issue citation to persons who should have been apprised of the probate proceedings was not held to be a ground for granting revocation. In this regard, it would be worth noting the observations in the decision of the Apex Court (Supra). What is observed is as under :-

> "The omission to issue citation to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant..."

. These observations, therefore, fully support the case of the Petitioners.

14. It is further submitted on behalf of the Respondents that one of the contentions of the Petitioners is that deceased had only 1/4th share in the

property and on such contention no revocation can be granted. There should be no dispute about proposition that the person who claims right or title in the property, which is subject matter of the Will cannot get revocation. It is because he had an independent right to file a Suit which is a remedy for him. However, in the present case, I am not considering that ground for revocation. The ground which I have considered as stated above, is of non-service of citation on the petitioners. There is no dispute that the petitioners are the heirs of the deceased and, therefore, they have interest in the property of the deceased as heirs and, therefore, they were the parties who should have been served with the citation. A party seeking revocation must have interest in the estate of the deceased. The Petitioners being the heirs of the deceased are having interest in the estate of the deceased.

15. Under these circumstances, the petitioners' case fall under Section 263 of the Indian Succession Act. Therefore, the petition needs to be allowed. Hence, the Order :-

ORDER

1. The Petition is made absolute in terms of prayer clause (a).

2. In the circumstances, no order as to costs.

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[S.K.Shah, J.]

Godbole

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISC. PETITION NO. 33 OF 2004
IN
PROBATE PETITION NO.143 OF 2004

Date of Decision : September 30, 2004.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers

may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copyof the Judgment should be sent to Nagpur, Goa and Aurangabad office?

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Versus.

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Ms. Nilima Datta for the Petitioners.
Mr. A.J. Almedia for the Respondents.
CORAM : S.K.Shah, J.
Date of Reserving the Judgment : 23.9.2004
Date of Pronouncement of Judgment : 30.9.2004

. For the Reasons separately recorded in the Judgment the Honourable Court has passed the following Order -

ORDER

1. The Petition is made absolute in terms of prayer clause (a).
2. In the circumstances, no order as to costs.

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[S.K.Shah, J.]